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In the Supreme Court of the United States

OCTOBER TERM, 1979

JICARILLA APACHE TRIBE, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-42a) is reported at 601 F. 2d 1116. The opinion of the district court (Pet. App. 1a-2a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1979. The petition for certiorari was filed on September 20, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether this Court's holding in *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976), that a federal district court properly may dismiss a

case brought to determine the water rights of an Indian tribe in favor of a pending state stream adjudication, should be clarified, qualified or reconsidered.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent portions of the New Mexico Enabling Act of June 20, 1910, ch. 310, 36 Stat. 557, the New Mexico Constitution, and the McCarran Amendment, 43 U.S.C. 666, are set out in the petition at 3-5.

STATEMENT

On December 12, 1975, the Jicarilla Apache Tribe filed a complaint in the United States District Court for the District of New Mexico to adjudicate the water rights in that State on the Navajo River and its tributaries, and also for a declaration that the Secretary of the Interior was improperly diverting water from the Navajo River through the San Juan-Chama Reclamation Project (Pet. App. 43a-52a). Named as defendants were the United States, the Secretary of the Interior, and certain private parties who used water from the Navajo River in New Mexico. The claims against the private parties were subsequently settled, leaving only claims against the federal defendants in the case at the present time.

On February 15, 1977, the United States filed an answer in which it admitted the jurisdiction of the federal district court. On April 13, 1977, the State of New Mexico, as amicus curiae, filed a suggestion of want of jurisdiction. After a hearing, the district court entered an order on July 19, 1977, dismissing the complaint for lack of jurisdiction (Pet. App. 1a-2a).

The district court's order took note of *State of New Mexico ex rel. Reynolds* v. *United States*, No. 75-184 (Dist. Ct. San Juan County, filed March 13, 1975), a

general stream adjudication filed by the State of New Mexico in state court on March 13, 1975, to determine rights to the use of water in New Mexico from the San Juan River and its tributaries, including the Navajo River. The State's complaint in *Reynolds* alleged (Pet. App. 54a) that a prior state court adjudication had already settled all known claims to waters of the San Juan River System, except the claims of the United States and the Jicarilla Apache, Ute Mountain Ute, and Navajo Tribes.[1] From the face of the complaint, the purpose of the state court action therefore appeared to be to adjudicate the water rights of the United States and the three tribes.

The district court concluded that the United States was properly named as a defendant in state court in *Reynolds* under the authority of the McCarran Amendment, 43 U.S.C. 666, on its own behalf and on behalf of the three Indian tribes. Pet. App. 1a. In dismissing the complaint, the district court simply noticed that the state court proceeding had been filed several months earlier and that a New Mexico state statute, N.M. Stat. Ann. §75-4-6 (1953 Comp.),[2] gave exclusive jurisdiction to adjudicate water rights to "[t]he Court in which any suit involving the adjudication of water rights may be properly brought." Pet. App. 2a. The district court therefore dismissed the complaint for lack of jurisdiction over the subject matter.

On appeal to the Tenth Circuit, the Tribe and the United States argued that New Mexico's courts did not have jurisdiction to adjudicate Indian water rights because

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[1]The United States attempted to remove the state court case to federal court, and there to have it dismissed for lack of jurisdiction, but on each occasion the federal district court remanded the case.

[2]This statute is now codified as N.M. Stat. Ann. §72-4-17 (1978 Comp.).

of a provision in Section 2 of the Enabling Act admitting New Mexico to the Union, 36 Stat. 558-560, repeated in Section 2 of the New Mexico Constitution, by which the State disclaimed jurisdiction over Indian tribes and their property. Alternatively, they argued that even if the State had jurisdiction to adjudicate waters held by the United States for the benefit of Indians, the district court had erred in concluding that the New Mexico statute could deprive a federal district court of subject matter jurisdiction granted by federal statute and that the district court had improperly failed to balance the considerations set out in *Colorado River, supra*, for determining when a federal district court should dismiss a water adjudication in favor of a pending state case. The State, as amicus curiae, filed a brief urging affirmance of the dismissal by the district court.

On March 12, 1979, the court of appeals entered an order affirming the district court's dismissal of the water rights adjudication.[3] The court of appeals found that the state court in *Reynolds* had jurisdiction to adjudicate the water rights of the Tribe, notwithstanding the disclaimer clauses of the State's Constitution and Enabling Act. In the court of appeals' view (Pet. App. 33a-36a), the authorization this Court found (see *Colorado River, supra*, 424 U.S. at 809-813) in the McCarran Amendment for state courts to adjudicate water rights held by the United States for the benefit of Indian tribes implicitly repealed any prohibitions in a state's Enabling Act to the extent necessary to permit that adjudication.

[3]The court of appeals remanded the action for a determination on the San Juan-Chama Project issue. There is general agreement that the district court has jurisdiction to determine that issue.

The court of appeals did not consider whether the district court acted properly in mechanically dismissing the Tribe's action in reliance on the New Mexico statute it read to grant exclusive jurisdiction to the State court. There was likewise no mention of the district court's failure to weigh the factors set out in *Colorado River* for determining whether a federal court should dismiss in favor of a pending state water rights adjudication; nor did the court of appeals discuss those criteria itself.

DISCUSSION

In *Colorado River, supra*, the Court held (424 U.S. at 809-813) that the McCarran Amendment waives the sovereign immunity of the United States in respect of water rights it holds for the benefit of Indian tribes and also that the Amendment permits state courts to adjudicate those rights. At the same time, the Court recognized that the federal courts may adjudicate tribal water rights in actions brought under 28 U.S.C. 1345, and announced certain criteria for deciding whether a federal court should retain jurisdiction in a water rights case when a state-court action addressing the same rights is pending, 424 U.S. at 817-821. In application, however, the decision has not fullfilled the hope that it would eliminate duplicative litigation and provide a harmonious accommodation of competing interests.

On the contrary, because of the special importance of the forum in this context, the actual consequence of *Colorado River* has been to promote an unseemly race to the courthouse, followed by often prolonged and intense jurisdictional skirmishing, pursued both in state and federal courts. The upshot is a waste of judicial resources and an increased risk of tension between the parties and

the two court systems. In these circumstances, we urge the Court to take the present opportunity to clarify, qualify, or perhaps reconsider, its *Colorado River* decision.

1. One source of the difficulties encountered in applying it is the apparently anomalous character of the *Colorado River* holding that the McCarran Amendment, which does not mention Indians or State courts, must nevertheless be read as waiving the sovereign immunity of the United States so as to permit the adjudication of Indian water rights in the courts of the State—notwithstanding the seemingly contrary directive of Public Law 280 with specific reference to tribal water rights, 28 U.S.C. 1360(b), and the opposite result when Indian land rights are involved, *Minnesota* v. *United States*, 305 U.S. 382 (1939). This has led some to conclude—wrongly, as we suppose—that all the usual rules of construction applicable to legislation touching vital Indian interests are inoperative in water rights cases.

We confront one aspect of that question in deciding whether the McCarran Amendment overrides the Indian disclaimer clauses of Enabling Acts and State Constitutions governing several Western states, including New Mexico. The continuing force of those provisions as inhibiting the jurisdiction of State courts was recognized by Public Law 280 in 1953 and the Indian Civil Rights Act in 1968, when Congress authorized the affected States to overcome the obstacle in some circumstances. Pub. L. No. 83-280, Section 6, 67 Stat. 590; Pub. L. No. 90-284, Section 404, 82 Stat. 79, 25 U.S.C. 1324. See *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 481 (1979). Presumably, the disclaimer clauses remained effective insofar as the States failed to act timely (see *Kennerly* v. *District Court*, 400 U.S. 423, 427 (1971)), or in areas

exempt from Public Law 280, such as water rights. 28 U.S.C. 1360(b); cf. *Bryan* v. *Itasca County*, 426 U.S. 373 (1976).

So, also, it remains unsettled whether, under *Colorado River*, the McCarran Amendment overrides the right of Indian tribes, granted by 28 U.S.C. 1362, to pursue their claims in federal court independently of the United States. See *Moe* v. *Salish & Kootenai Tribes*, 425 U.S. 463, 472-475 (1976). That is the result if, as here, the Tribe's suit is dismissed in favor of a pending State court action where it is only indirectly represented by the United States. We assume an Indian Tribe, enjoying sovereign immunity and unmentioned in the McCarran Amendment, cannot be made an involuntary party in the State court. It may be, moreover, that the State plaintiff can block its attempt to intervene as a separate party—thereby creating a very awkward situation when, as alleged here, the tribe's claim is, in some respects, adverse to other federal claims. And, even if free to participate in the state court proceedings, the tribe is effectively deprived of both its sovereign immunity and its right to a federal forum.

These problems—squarely presented by this case—create a serious dilemma. It would be extraordinary to read into the seemingly innocuous words of the McCarran Amendment an intent to nullify the express protections Congress provided for Indian rights by both earlier and later enactments—and to do so in respect of access to water, the most vital resource of many of the subsisting Indian tribes. Yet, it seems to us equally difficult to ascribe to Congress an intent to preserve the important guarantee of a federal forum for tribes in "disclaimer" states, but not elsewhere, or when the tribe asserts water rights in its own name, but not when the United States advances the tribe's rights. The answer may lie in a re-

examination of the basic holding of *Colorado River* that the McCarran Amendment empowers state courts to adjudicate Indian water rights.

2. It may be, however, that most of the practical difficulties would be avoided if it were made clear that, although state and federal courts have concurrent jurisdiction, the *preferred* forum for the adjudication of Indian water rights is the federal district court. The McCarran Amendment, insofar as it permits state courts to determine interests held by the national government, is of course an exception to the normal rule that the United States is entitled to insist on suing and being sued in its own courts. The exception ought not be extended beyond the necessities which created it. All the more so when the rights asserted by the government are those of Indian tribes, for, unfortunately, it remains true that State courts are often inhospitable to the claims of Indian tribes under federal law. See *Washington* v. *Fishing Vessel Ass'n*, No. 77-983 (July 2, 1979), slip op. 13-15. See, also, *Wilson* v. *Omaha Indian Tribe*, No. 78-160 (June 20, 1979), slip op. 18. Special circumstances may require submitting Indian water rights to State court adjudication and, in some cases, there may be no reason to seek a federal forum even though available. But, in our view, the jurisdiction of the federal court, if timely invoked, ought normally to preempt a competing state court proceeding when Indian water rights are at stake.

This Court's decision in *Colorado River* may announce the rule we suggest. But, especially in light of the dissents (424 U.S. at 821-827), that is not generally understood. At the least, it is obvious that the lower courts have not all so read the case. Thus, here, the district court dismissed the tribe's suit on the sole ground that there was a pending state court action covering the same water claims, which,

under a state statute, was the exclusive forum. Pet. App. 2a. The court did not consider whether it ought to entertain the case, although there were, as it happens, special reasons for doing so.[4] Nor did the court of appeals purport to determine whether there were practical obstacles to the proposed federal court adjudication. Pet. App. 41a.[5] No doubt, the courts in this case failed to give the question that "carefully considered judgment" mandated by *Colorado River* (424 U.S. at 818). But, on the other hand, it may be that this Court could usefully provide additional guidance on the question.

3. At the least, we submit the Court should clarify its ruling. As things are, suits filed to adjudicate Indian water rights are often delayed while the parties maneuver to have the case heard in their preferred forum. Where Indian tribes bring such actions in federal district court,

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[4]As we have noted:

(1) The State court complaint stated that all non-federal claims had been previously adjudicated (see Pet. App. 54a);

(2) The State court action had been filed only nine months before the federal suit and no proceedings other than jurisdictional notices had been undertaken (see Pet. App. 4a-5a);

(3) Both the United States and the Tribe asserted that there existed a conflict between the tribal water claims and those asserted by the government for other uses (see Pet. App. 5a-10a, 45a);

(4) The claims of all claimants other than the United States and the Tribe in the federal suit were amicably settled (Pet. 6 n.1).

[5]While reversing as to the San Juan-Chama Project diversion dispute between the Tribe and the Secretary (Pet. App. 41a-42a), the court of appeals, after rejecting the "disclaimer clause" argument (Pet. App. 20a-41a), merely affirmed the district court's dismissal of the complaint for a general water rights adjudication in a single conclusory paragraph, reciting only "the fact that an identical action had been previously filed in the state court." Pet. App. 41a.

the non-Indian parties move for their dismissal in favor of a pending state case.[6] Similarly, where non-Indians apply to state forums to adjudicate their rights, the Indians remove the action to federal district court.[7] Moreover,

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[6]For example, see the following water rights cases, all filed in the United States District Court for the District of Arizona: *Salt River Pima-Maricopa Indian Community* v. *Arizona*, Civ. No. 79-185 PHX VAC; *San Carlos Apache Tribe* v. *Arizona*, Civ. No. 79-186 PHX VAC; *Payson Community of Yavapai Indians* v. *Arizona*, Civ. No. 79-187 PHX VAC (consolidated, filed March 7, 1979); *San Carlos Apache Tribe* v. *Arizona*, Civ. No. 79-269 PHX VAC (filed April 16, 1979); *Fort McDowell Mohave-Apache Indian Community* v. *Salt River Valley Water Users Association*, Civ. No. 79-267 PHX VAC (filed April 13, 1979); *Navajo Nation* v. *United States*, Civ. No. 79-276 PCT-VAC (filed April 17, 1979). In each case defendants have filed motions to dismiss, based on pending state actions. The motions have not been acted upon.

Likewise, in *United States* v. *Tongue River Water Users Association*, Civ. No. 75-20-BLG (D. Mont. 1974) and *United States* v. *Big Horn Low Line Canal*, Civ. No. 75-34-BLG (D. Mont., filed April 17, 1975), which seek adjudication of Indian water rights, motions to dismiss, based on pending state actions, were heard on September 10, 1976, and have not yet been decided.

[7]See *In re Determination of Conflicting Rights to the Use of Water from the Salt River Above Granite Reef Dam and Its Tributaries Including Tonto Creek, Excluding the Verde River and Its Tributaries, Arizona State Land Department* (filed April 26, 1974). The White Mountain Apache Tribe, the Gila River Indian Community, and the Salt River Pima-Maricopa Indian Community, separately petitioned to remove the action to the United States District Court for the District of Arizona, Nos. 79-182 PHX VAC, 79-183 PHX VAC and 79-184 PHX VAC. Motions to remand to the state forum were argued September 25, 1979, and have not yet been decided.

Similarly, in *State of Washington* v. *Acquavella*, No. 77-2 C 1484-5 (Super. Ct. Yakima Cty., filed October 25, 1977), the State brought a general stream adjudication of the Yakima River, including the rights of the Yakima Tribe. The United States removed to federal court, which subsequently remanded the action to the state court. This pattern was also followed in *In re the General Adjudication of All*

some actions have been filed merely in order to obtain a jurisdictional foothold, causing many private water users to be served in a judicial proceeding that might otherwise have been avoided through negotiation.[8]

CONCLUSION

For the foregoing reasons, the Court should grant certiorari.

Respectfully submitted.

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Rights to Use Water in the Big Horn River System and All Other Sources, State of Wyoming, Civ. No. 4993 (Dis. Ct. Washakie County, Wyoming), which seeks to adjudicate the rights of all people in the Big Horn River Basin and its tributaries including the tribes of the Wind River Reservation.

[8]See, *e.g.*, *United States* v. *Ames Ranch, Inc.*, Civ. No. 79-22-GF (D. Mont. 1979); *United States* v. *Aageson*, Civ. No. 79-21-GF (D. Mont. 1979); *United States* v. *Aasheim*, Civ. No. 79-40-BLG (D. Mont. 1979); *United States* v. *Abell*, Civ. No. 79-33-M (D. Mont. 1979).

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